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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. [redacted] 67

MORRIS MILLER,

Petitioner,

v.

IRVING TRUST COMPANY, as Trustee in bankruptcy of SARNOFF-IRVING HAT STORES, INC., Bankrupt,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

SOL M. STROOCK,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No.

MORRIS MILLER, Petitioner, *against* IRVING TRUST COMPANY, as Trustee in bankruptcy of SARNOFF-IRVING HAT STORES, INC., Bankrupt, Respondent.	PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Morris Miller respectfully shows to this Honorable Court:

Your petitioner, claimant-appellant below, applies for a writ of certiorari to review the final order of the United States Circuit Court of Appeals for the Second Circuit, entered May 6th, 1935, affirming final order of the United States District Court for the Southern District of New York (Hon. MURRAY HULBERT, D. J.). This order confirmed an order by the Referee in Bankruptcy reducing the claim of petitioner against the above named bankrupt from the sum of $16,625 to the sum of $400, and expunging the claim for the balance.

Summary Statement of the Facts.

The bankrupt as tenant entered into a lease with petitioner as landlord for a term commencing August 1st, 1928 and ending July 31st, 1938, of premises 203 Springfield Avenue, Newark, N. J.

On April 27th, 1932, and after the bankrupt had been in possession of the premises for nearly four years, an Equity Receiver was appointed for the bankrupt by the United States District Court for the Southern District of New York. On June 1st, 1932, the said Equity Receiver disaffirmed the said lease and on July 18th, 1932, vacated possession of the premises. The claimant, pursuant to the terms of said lease, reentered the premises and took possession on July 25th, 1932.

Thereafter, and on August 27th, 1932, the lessee filed a voluntary petition in bankruptcy. Thus the lease had been terminated and there had been a reentry by the landlord prior to bankruptcy. After bankruptcy the landlord relet, to third parties, the premises abandoned by the Equity Receiver, for the balance of the term and at a rental substantially lower than that payable by the bankrupt under its lease.

The lease to the bankrupt contained the usual indemnity clause that in the event of termination of the lease, the tenant would continue liable for the difference between the rent reserved in the lease and the avails of reletting, to be paid monthly on the several rent days specified in the lease.

Petitioner filed proof of claim in bankruptcy in the sum of $16,625. He has already received $600 of said sum as a preferred claim under the local laws of New Jersey. Both the District Court and the Circuit Court of Appeals have decreed that petitioner is entitled to claim for an additional $400 for rent that became owing prior to the bankruptcy. The balance of said claim, which is

to recover petitioner's damages, has been expunged by the courts below. The amount of petitioner's damages has not been adjudicated. It was stipulated before the Referee in Bankruptcy that the determination of *the amount* of petitioner's damages and the liquidation of his claim be reserved pending determination of the question of law as to whether petitioner has a provable claim for said damages.

Similar facts, involving substantially the same questions of law, were involved in the case of *Urban Properties Company* v. *Irving Trust Company,* which was decided by the Circuit Court of Appeals, Second Circuit, in January of this year (74 F. [2d] 654). This Court has just granted (May 6th, 1935) a writ of certiorari in that case.

The Questions Presented.

1. Where a lease is terminated by a landlord by reason of the tenant's default, and the landlord reenters prior to bankruptcy, does an ensuing bankruptcy constitute an anticipatory breach of an indemnity contract contained in the lease and has the landlord a provable claim for the damages resulting from such anticipatory breach of the indemnity contract?

2. Is the measure of damages for such anticipatory breach of the indemnity contract the difference between the rent reserved in the lease and the fair rental value of the premises, having due regard to the present cash value of payments ordinarily payable over a period of years, and are such damages so difficult of determination as to render them incapable of liquidation under §63-b of the Bankruptcy Act?

Reasons Relied on for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Second Circuit herein is directly in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Lloyd Investment Co.* v. *Schmidt,* 66 F. (2d) 371 (cert. den. 291 U. S. 668).

2. This case involves substantially the same questions of law as are present in the case of *Urban Properties Company* v. *Irving Trust Company,* as Trustee in Bankruptcy of F. & W. Grand 5-10-25 Cent Stores, Inc., Bankrupt. In that case the Circuit Court of Appeals for the Second Circuit rendered a decision expunging the claim of the landlord, substantially similar to the claim of the landlord herein (74 F. [2d] 654). The landlord in that case applied to this Court for a writ of certiorari. The landlord's petition was granted by this Court by decision handed down on May 6th, 1935.

3. In the application for certiorari in the *Urban Properties* case, it was urged that the decision in that case (*Urban Properties*) conflicted with the decision in *Lloyd Investment Co.* v. *Schmidt,* 66 F. (2d) 371, *supra.* In principle that is true. Factually, however, *Lloyd Investment Co.* v. *Schmidt* is *identical* with the case at bar and only *similar* to the facts in the *Urban Properties* case, and the decision of the Seventh Circuit in that case conflicts directly with the decision of the Second Circuit herein.

4. The questions embodied in the instant case should be determined simultaneously with the questions involved in *Urban Properties Company* v. *Irving Trust Company,* 74 F. (2d) 654, *supra,* so that all doubts as among the various Circuits may be resolved. Indeed, the factual situation presented in the case at bar will arise more fre-

quently than that in the *Urban Properties* case. In the *Urban Properties* case the lease was terminated before the term ever began; in the case at bar the lease was terminated after the tenant had been in possession for several years. From a practical point of view, a decision on the factual situation involved in the case at bar is apparently of more general importance than a determination of the *Urban Properties* case.

5. The law governing landlord's claims in bankruptcy is uncertain in those cases where the facts are not the same as in *Manhattan Properties* v. *Irving Trust Company*, 291 U. S. 320, and *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320. A determination by the Supreme Court of the questions involved in the *Urban Properties* case and this case will substantially end the uncertainty now existing.

6. A decision of the *Urban Properties* case may not necessarily dispose of all of the questions involved in the case at bar and it is therefore of importance that all of the questions presented here be finally determined beyond any doubt.

7. The decision in the Circuit Court of Appeals herein is incorrect and in conflict with the reasoning of this Court in *Manhattan Properties* v. *Irving Trust Company*, 291 U. S. 320, *supra*.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the decree of the Circuit Court of Appeals for the Second Circuit, and that the order of said Court be reversed, and that the argument of the appeal herein be set down for the same date to be set for the argument of the appeal in the case of *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654, *supra*.

SOL M. STROOCK,
Attorney for Petitioner.

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No. _____

MORRIS MILLER,
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against
IRVING TRUST COMPANY, as Trustee in bankruptcy of SARNOFF-IRVING HAT STORES, INC., Bankrupt,
Respondent.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States District Court is not yet reported. The United States Circuit Court of Appeals for the Second Circuit handed down a per curiam opinion as follows:

> "Order affirmed on authority of In re F. & W. Grand 5-10-25¢ Stores, 74 Fed. (2) 654 (C. C. A. 2)."

Jurisdiction.

The order of the Circuit Court of Appeals was made and entered on May 6th, 1935. The jurisdiction of this Court is invoked under §240-a of the Judicial Code as amended by the Act of February 13th, 1925 (43 Stat. 938). The petition was filed in accordance with Rule 38 of this Court.

Statement of the Facts.

A full statement of the facts will be found under the heading "Summary Statement of the Facts" in the peti-

tion for writ of certiorari, to which this brief is annexed. In the interest of brevity this statement will not be repeated.

Summary of the Argument.

1. The termination of the lease and re-entry by the landlord upon the tenant's default invoked by the terms of the lease an independent personal contract by the tenant to pay damages.

2. The subsequent bankruptcy of the tenant constituted an anticipatory breach by the tenant of its personal contract to pay damages.

3. The anticipatory breach of this personal contract gave rise to a claim in favor of the landlord and against the tenant for the fair value of the personal contract that was so breached, which is the difference between the amount of rent payable under the lease that was terminated and the fair rental value of the premises at the date of bankruptcy. This is a debt that was owing at the time of bankruptcy within §63-a of the Bankruptcy Act.

4. Such damages are fair and reasonable and are not speculative and are capable of liquidation under subdivision "(b)" of §63 of the Bankruptcy Act.

POINT I.

The termination of the lease and re-entry by the landlord upon the tenant's default invoked by the terms of the lease an independent personal contract by the tenant to pay damages.

Prior to bankruptcy the lease had been terminated and the relationship of landlord and tenant no longer existed, and all that remained was a personal contract between

the former landlord and the former tenant whereby the former tenant agreed to pay the former landlord damages for its breach of the lease in amounts and in the manner specified in the written contract.

Hall v. *Gould*, 13 N. Y. 127;
McCready v. *Lindenborn*, 172 N. Y. 400;
Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597;
Manhattan Properties v. *Irving Trust Company*, 291 U. S. 320.

In the last cited case, this Court stated (p. 338):

> "In both cases the lessor has the choice whether he will terminate the lease * * *. And upon the exercise of the option by the landlord a new contract distinct from that involved in the original letting becomes operative."

POINT II.

The subsequent bankruptcy of the tenant constituted an anticipatory breach by the tenant of its personal contract to pay damages.

Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581;
Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597, *supra*;
Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320;
Lloyd Investment Co. v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7).

In *Manhattan Properties* v. *Irving Trust Company*, 291 U. S. 320, this Court stated (p. 338):

> "While there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract

entailing a damage claim against the estate, this cannot be true as respects these independent covenants of indemnity. *For here the landlord does not rely upon the destruction of his contract by the bankruptcy;* he initiates a new contract of indemnity by the affirmative step of reentry. And this new contract comes into being not by virtue of the bankruptcy proceeding but by force of the act of reentry which must occur at a date subsequent to the filing of the petition. Obviously this contract of indemnity is not breached by bankruptcy and cannot be breached until the duty of indemnifying the landlord arises." (Italics ours.)

In the *Manhattan Properties* case, bankruptcy, as the Court stated, could not constitute anticipatory breach of the independent contract, because this contract did not arise until after bankruptcy, but in the case at bar the independent contract came into being *prior* to the bankruptcy and the landlord does "rely upon the destruction of his contract by the bankruptcy".

POINT III.

The anticipatory breach of this personal contract gave rise to a claim in favor of the landlord and against the tenant for the fair value of the personal contract that was so breached, which is the difference between the amount of rent payable under the lease that was terminated and the fair rental value of the premises at the date of bankruptcy. This is a debt that was owing at the time of bankruptcy within §63-a of the Bankruptcy Act.

Whatever doubt there may have been prior thereto on the authorities, the case of *Maynard* v. *Elliott*, 283 U. S. 273, settled the law that it is no objection to proving a claim in bankruptcy that the claim is contingent.

Whatever contingencies there may be in regard to the damages suffered by petitioner in the case at bar were

likewise present in *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581, *supra*, wherein this Court held the claim a provable one in bankruptcy. It would appear that this Court has long since settled the question that a claim for anticipatory breach of a personal contract is a debt owing at the time of bankruptcy and provable under §63-a of the Bankruptcy Act.

POINT IV.

Such damages are fair and reasonable and are not speculative and are capable of liquidation under Subdivision "(b)" of §63 of the Bankruptcy Act.

The Circuit Court of Appeals for the Second Circuit has ruled adversely to claims of the type involved in the case at bar, on the ground that the measure of damage is so speculative that the claim is incapable of liquidation under subdivision "(b)" of §63 of the Bankruptcy Act.

Urban Properties Company v. *Irving Trust Company*, 74 F. (2d) 654;
Malavazos v. *Irving Trust Company*, 66 F. (2d) 482.

It is clear that the Circuit Court of Appeals in its decision herein relied on the same grounds, for it affirmed the order of the District Court "on the authority of" the *Urban Properties* case. The essence of this argument is that although the Court concedes that the claimant has a contract claim which was owing at the time of bankruptcy and that the claimant has incurred a loss, nevertheless, the machinery of the bankruptcy courts is inadequate to assess the amount of that loss.

We urge that the bankruptcy courts, being courts of equity, are not so rigid or restricted in their powers that

they are incapable of giving fair and just redress to one who concededly has a claim and has suffered a loss. Indeed, liquidation of petitioner's claim in the case at bar would be neither difficult nor speculative. This Court has already described a contract for the payment of the difference between the rent reserved and the rental value of the premises as:

> "a personal covenant that liquidated the damages upon a footing that was *familiar and fair.*" (Italics ours)—(*Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597.)

This Court likewise enforced such a clause in *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320, *supra*. Can it be that this same measure of damages is more difficult to compute or more speculative when it follows as the natural measure of damages for breach of a personal contract than where it is specified in a contract as the measure to be used in liquidating damages?

The Circuit Court of Appeals in the Seventh Circuit differs from the conclusion of the Circuit Court of Appeals in the Second Circuit, for in *Lloyd Investment Co.* v. *Schmidt*, 66 F. (2d) 371, *supra*, the Court concluded that damages were not too speculative under facts identical with those in the case at bar, and permitted the liquidation thereof and the allowance of the claim.

In *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654, *supra*, Judge MANTON, in dissenting, concluded that such damages were not speculative.

The question as to whether or not damages of this kind are too speculative to be capable of liquidation is one of the principal questions that was left undecided by the *Manhattan Properties* case, and for this reason alone, if for no other, we submit that it is important that petitioner's writ of certiorari should be granted so that this important question of law may be authoritatively determined.

Conclusion.

Most of the questions here involved will be presented to this Court shortly by virtue of the granting of petition for writ of certiorari in *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654, *supra*. The remaining questions that are involved in this case, and which are not involved in the *Urban Properties* case, should also be determined at the same time, because:

(a) The decision in the Circuit Court of Appeals in this case is directly opposed to the decision of the Circuit Court of Appeals in the Seventh Circuit; and

(b) Factually the situation involved in the case at bar is likely to occur more frequently than the factual situation involved in the *Urban Properties* case.

Respectfully submitted,

SOL M. STROOCK,
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